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ATTORNEY GENERAL OF WASHINGTON

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October 16, 2008

The Honorable Jerome Delvin
State Senator, 8th Legislative District
P.O. Box 40408
Olympia, WA 98504-0408

Dear Senator Delvin:

By letter previously acknowledged, you have requested an opinion on a question I have paraphrased as follows:

- 1. Does the State Environmental Policy Act (SEPA) require state and local agencies to mitigate greenhouse gas emissions or global warming/climate change, or require agencies to deny or condition a proposed action based on greenhouse gas emissions or global warming/climate change?**
- 2. Does SEPA grant state and local agencies the authority to condition or to deny a proposed action based on greenhouse gas emissions or global warming/climate change?**

BRIEF ANSWER

SEPA establishes an obligatory process for assessing proposed projects to ensure that a range of potential environmental concerns are identified and considered before government action, including permitting, takes place. In addition, SEPA empowers agencies to condition or deny government action based upon policies formally adopted by the agency. Accordingly, although SEPA itself does not directly require state or local agencies to condition or deny actions based on their environmental consequences, government policies adopted pursuant to SEPA authority could create such requirements.

SEPA directs the Department of Ecology to define the elements of the environment by rule. RCW 43.21C.110(1)(f). The various elements of the environment that must be considered in relation to environmental impacts under SEPA include "climate." WAC 197-11-444(1)(b)(iii). To the extent greenhouse gas emissions or global warming/climate change related to a proposed project have significant adverse environmental impacts, they may be a basis for

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conditioning or denying proposed actions under SEPA, pursuant to policies properly adopted by government agencies.

ANALYSIS

1. Does SEPA require state and local agencies to mitigate greenhouse gas emissions or global warming/climate change, or require agencies to deny or condition a proposed action based on greenhouse gas emissions or global warming/climate change?

SEPA is primarily concerned with the process by which state and local agencies consider the environmental impact of various actions, although the courts have found that SEPA also has a substantive aspect. RCW 43.21C.060 states:

Any governmental action may be conditioned or denied pursuant to this chapter: PROVIDED, That such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency (or appropriate legislative body, in the case of local government) as possible bases for the exercise of authority pursuant to this chapter. Such designation shall occur at the time specified by RCW 43.21C.120.

The authority to condition or deny proposals under SEPA, as opposed to other laws, is referred to as "substantive authority." *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 64-67, 578 P.2d 1309 (1978).

Under the authority granted in RCW 43.21C.110, the Department of Ecology has promulgated rules to interpret and implement SEPA, found at WAC 197-11. WAC 197-11-660(1) states, in part:

Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact subject to the following limitations:

(a) Mitigation measures or denials shall be based on policies, plans, rules, or regulations formally designated by the agency (or appropriate legislative body, in the case of local government) as a basis for the exercise of substantive authority and in effect when the DNS or DEIS is issued.

(b) Mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal and shall be stated in writing by the decision maker. The decision maker shall cite the agency SEPA policy that is the basis of any condition or denial under this chapter (for proposals of applicants).

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WAC 197-11-902(1) states, in part, that "[t]he Act and these rules allow agencies to condition or deny proposals if such action is based upon policies identified by the appropriate governmental authority."¹ Both the statute and rules use the word "may" when referring to substantive authority. WAC 197-11-902(1) also uses the word "allow." "The term 'may' is presumed to be permissive or discretionary, especially when used alongside mandatory language in the same statute or code." *Richards v. City of Pullman*, 134 Wn. App. 876, 883, 142 P.3d 1121 (2006).

Based on the use of permissive language in both the Act and the administrative rule, there does not appear to be a mandatory requirement in SEPA itself for state and local agencies to deny or condition a proposed action based on impacts related to greenhouse gases, or global warming/climate change, or some other cause. SEPA's substantive requirements, however, are effectuated through agency or local government policies, as illustrated above in RCW 43.21C.060 and WAC 197-11-660(1). Thus, an individual agency or local government may have policies, plans or rules that would create requirements for conditioning, mitigating, or denying a proposed action. If an agency has policies related to greenhouse gases, for instance, SEPA would require the agency to consider this issue when deciding whether to permit a proposed action. In effect, SEPA is the tool for implementing the underlying substantive policy requirement.

SEPA procedures and decisions are typically subject to judicial review when they are appealed in connection with the underlying governmental decision with respect to which SEPA review was performed. RCW 43.21C.075(6)(c). For example, state agency decisions would likely be reviewed under the Administrative Procedure Act, where the court would review an agency's decision to determine whether it was arbitrary or capricious. *See, e.g.,* RCW 34.05.570(3)(i) (review of adjudicative orders); RCW 34.05.570(4)(c)(iii) (review of "other agency action"). Under this type of review, an agency may be found to have acted arbitrarily by failing to require mitigation in a permitting decision or for its own proposal, when a significant adverse environmental impact was identified in an environmental impact statement and not mitigated consistent with agency SEPA policies. Of course, whether this would be the case is fact-dependent, because there may be competing statutory policy directives, financial limitations imposed by the Legislature, or other statutes with which the agency must comply.

2. Does SEPA grant state and local agencies the authority to condition or to deny a proposed action based on greenhouse gas emissions or global warming/climate change?

"Climate" has been defined in the SEPA rules as an element of the environment to be considered in SEPA analyses since 1984. WAC 197-11-444(1)(b)(iii). The Washington

¹ "Agency" means any state agency as defined in WAC 197-11-796 or any local agency as defined in WAC 197-11-762, WAC 197-11-714(1). Thus, SEPA's grant of substantive authority applies to state and local agencies.

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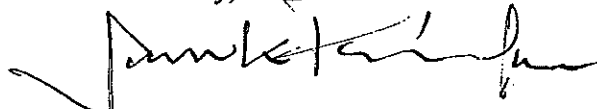
Legislature has found that "[e]xtreme weather, a warming Pacific Northwest, reduced snow pack, and sea level rise are four major ways that climate change is disrupting Washington's economy, environment, and communities". RCW 80.80.005(1)(a). The United States Supreme Court has stated "[t]he harms associated with climate change are serious and well recognized." *Massachusetts v. E.P.A.*, 549 U.S. 497, 127 S. Ct. 1438, 1442, 167 L. Ed. 2d 248 (2007).

As noted above, SEPA provides that state and local agencies are authorized to condition or deny proposed actions based on adverse environmental impacts. RCW 43.21C.060; *Polygon Corp.*, 90 Wn.2d at 64-67. However, as the governing rules illustrate, SEPA does not authorize purely *ad hoc* conditioning or denial. Rather, the substantive authority of state or local agencies under SEPA depends on each agency's formally designated policies, plans, and regulations. WAC 197-11-660(1)(a). For example, the substantive authority provided by SEPA could be directed to greenhouse gas emissions or global warming/climate change issues if a state or local agency has a properly adopted policy under which it may address such environmental impacts.

In addition, the authority granted by SEPA allows an action to "be conditioned only to mitigate specific adverse environmental impacts", and mitigation measures must be reasonable and capable of being accomplished. RCW 43.21C.060. For a denial, there must be a finding that the proposal in question would result in significant adverse impacts which reasonable mitigation measures are insufficient to mitigate. RCW 43.21C.060. As described in the response to question 1 above, WAC 197-11-660(1) and WAC 197-11-902(1) contain language consistent with that in RCW 43.21C.060. Taken together, the SEPA statute and rules provide that, to the extent that greenhouse gas emissions and global warming/climate change have "specific adverse environmental impacts" or "significant adverse impacts," SEPA grants authority to state and local agencies to condition or deny proposed actions based on those impacts pursuant to formally designated policies.

I hope the foregoing information will prove useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "Nels Johnson", with a stylized flourish at the end.

Nels Johnson
Assistant Attorney General
360 586-3514

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